

*United States Court of Appeals
for the Second Circuit*



BRIEF FOR
APPELLEE

S/S

74-1271

To be argued by
HOWARD S. SUSSMAN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1271

ESMERALDO GAZARD COLON,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Esmeraldo Gazard Colon appeals from an order of the Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, entered January 22, 1974, denying Colon's motion pursuant to Title 28, United States Code, Section 2255, to vacate the sentence imposed on him on April 22, 1969, and for a new trial.

Indictment 68 Cr. 402, filed May 2, 1968, charged Colon in one count with the unlawful receipt, concealment, and facilitation of the transportation and concealment of 11.350 grams of heroin hydrochloride in violation of Title 21, United States Code, Sections 173 and 174. Prior to trial Colon moved to suppress the heroin found in his car. Judge Motley denied that motion after a hearing held October 14-15, 1968. Trial commenced March 10, 1969, before Judge Motley and a jury. The jury returned a ver-

dict of guilty on March 12.* On April 22, 1969, Judge Motley sentenced Colon to a term of twelve years as a second federal narcotics offender. This Court affirmed Colon's conviction in a *per curiam* opinion of December 11, 1969, *United States v. Gazard Colon*, 419 F.2d 120 (2d Cir. 1969).

On June 14, 1971 Colon filed his Section 2255 motion claiming, *inter alia*, that he had been denied the right to confront witnesses against him because the identity of an informer was not disclosed to him at his trial. After Colon had obtained new counsel in the early part of 1973, Judge Motley held three separate hearings on the motion to afford Colon an opportunity to offer proof in support of his speculations concerning the informer's value as a witness. Following the third failure to produce any evidence, at a hearing conducted on December 17, 1973 (H. 66-67),** Judge Motley denied the motion in an order filed January 22, 1974 (A-14), together with a memorandum opinion (A-15 to A-21).

Colon is presently serving his sentence.

Statement of Facts

Colon was arrested on the morning of April 23, 1968, at 181st Street and Grand Concourse in the Bronx. In affirming Colon's conviction, this Court described the informer's role in bringing about that arrest (419 F.2d, at 121-122):

* A prior trial, held January 7-9, 1969, also resulted in a jury verdict of guilty, but Judge Motley set that verdict aside, and ordered a new trial, on Colon's motion for a mistrial.

** Page references preceded by "H." are to the hearings on Colon's present Section 2255 motion, not included in Appellant's Appendix. Page references preceded by "A" are to that Appendix. Page references preceded by "Tr." are to the transcript of Colon's trial of March 1969, and those preceded by "S." are to the October 1969 hearing on Colon's motion to suppress.

"The informer, who had been a runner for Colon, told the agents that on the previous day he had observed Colon with one Nelson, his lieutenant, in a yellow 1968 Chevrolet with black vinyl top; that Colon gave a packet enclosed in tinfoil to Nelson, who entered the hallway of a nearby building and distributed the contents to persons whom the informer knew were Colon's runners; and that he also heard that Colon would return the next morning, April 23rd, with narcotics, which Colon usually carried, concealed, under the front seat of his automobile. After giving the agents this information, the informer led them to a place in the Bronx where Colon kept his car. The informer left, and the agents kept the car under surveillance. Shortly thereafter Colon appeared, unlocked his car after looking around, reached in his right hand pocket and bent over as if he were placing something under the front seat. He drove off but was stopped and placed under arrest. A search revealed a packet of heroin under the front seat."

As stated, the informer's role ended when he left the agents surveilling Colon's car. He was not present during, and did not see, the agents' surveillance, Colon's arrest or the search and seizure incident thereto (Tr. 19, 116).

At the suppression hearing Colon sought disclosure of the informer's identity to aid in showing that there had not been probable cause for his arrest. He raised the question "whether a man like that even existed" (S. 30) or was instead "a figment of the imagination of these agents" (S. 37). He produced a witness who claimed to have been, by pure coincidence, at the scene of the arrest and seizure and to have seen one of the agents plant the heroin in Colon's car in broad daylight (S. 145-147).* Judge Motley declined

* This witness also testified at Colon's trial (Tr. 334, 343-345), and the jury clearly rejected his testimony.

to order disclosure of the informer's identity on the probable cause question, but stated to Colon's counsel (S. 39 and A-19) :

"Mr. Chapman, I think that in line with the Supreme Court's opinion in the Roviaro case the defendant would be entitled to the identity of the informer if he were on trial."

Despite this favorable anticipatory ruling, Colon failed to request disclosure of the informer's identity at either of his two trials. Both times, he elected and adhered to the defense that one of the arresting agents had planted the heroin in his car at the time he was stopped. He produced two witnesses who claimed to have seen that plant (Tr. 30, 91, 124, 228, 291-292, 326, 334, 343-345). He made no suggestion that the informer had any information relevant to his claim that one of the agents had planted the heroin, and the jury clearly rejected the contention that one had done so. Colon did not contend at trial that the informer himself had planted the heroin or that an agent had revealed to the informer a plan to do so.

On his direct appeal Colon raised two points (419 F.2d, at 121) :

"first, that there was a lack of probable cause for his warrantless arrest and the incidental search; and, second, that the trial court erred in not requiring the Government to reveal the name of the informer."

This Court rejected both points, saying with respect to the second (419 F.2d, at 122) :

"Appellant's claim of error in the trial court's refusal to order the Government to disclose the name of the informer must also be rejected. There is nothing in the case that has cast the slightest suspicion or doubt on the accuracy of the informer's information, and the agents own knowledge and ob-

servations of Colon substantially confirmed the informer's story. Under these circumstances it was not error for the trial court to refuse to order disclosure of the informer's name. *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *United States v. Tucker*, 380 F.2d 206, 211-214 (2 Cir. 1967); *United States v. Shyvers*, 385 F.2d 837, 839 (2 Cir. 1967), cert. denied, 390 U.S. 998, 88 S.Ct. 1203 20 L.Ed.2d 98, rehearing denied, 390 U.S. 1046, 88 S.Ct. 1640, 20 L.Ed.2d 311 (1968)."

On June 14, 1971, a year and a half later, Colon filed the present Section 2255 motion seeking to vacate his sentence on four grounds (A-3) :

" . . . (1) there was no probable cause for the arrest of defendant; (2) defendant was denied his Sixth Amendment right to confrontation of the witness against him, to wit, an undisclosed informer; (3) perjured testimony was knowingly used in the prosecution of defendant, and [(4) defendant] was denied effective representation of counsel."

At a hearing on April 5, 1973, Colon's new counsel orally asserted that the informer's identity was relevant to Colon's trial defense and not merely to the probable cause question. Judge Motley's opinion described Colon's newly asserted claim as follows (A-16 to A-17) :

"At the hearing conducted on April 5, 1973, Colon's counsel asserted that an investigation had indicated certain inconsistencies in the testimony of one of the agents at the trial as to how he was informed in the middle of the night by his partner agent of the fact that petitioner might be in town and in possession of heroin. Counsel argued that this inconsistency suggested that the informer may have been non-existent.

"Petitioner's theory is that if the informer had been produced at trial he might have testified that he had merely told the agents of Colon's whereabouts so they could 'make a case against [him]', (Affidavit in Support of Motion to Vacate Sentence, p. 2 [A-5]), or the jury might have been shown that the informer was non-existent. In either event, petitioner claims, the jury might have concluded that the agents' testimony was not believable and that the testimony of defendants' witnesses that the heroin package was planted in Colon's car by an agent was more credible."

Colon's counsel "conceded that he lacked any evidence to support his assertion" (A-18 and A-21, n.1) and Judge Motley granted additional time for further investigation. Counsel reported at a second hearing on June 12, 1973, that further investigation had been fruitless (A-18 and A-21, n.2). An additional hearing was held on December 17, 1973, to examine the investigation which Colon's former counsel had conducted.

In her opinion denying Colon's motion (A-15 to A-21), Judge Motley rejected Colon's claims as "too speculative to warrant the granting of relief" (A-17).

ARGUMENT

Colon's Section 2255 Motion Was Properly Denied.

Colon's sole claim on this appeal is that he was denied a Sixth Amendment confrontation right at trial by the trial court's failure to order disclosure of the informer's identity. The claim is frivolous.

Colon failed to request disclosure of the informer's identity at two separate trials after specifically being told at a prior suppression hearing that he would be granted

such disclosure upon request. Hence his present contention that he was denied the right to confront this witness at trial is simply preposterous.* The alleged inconsistencies in wholly tangential trial testimony of one of the narcotics agents,** which are now said to have made the informer's production necessary, were visible at trial, and trial counsel obviously saw no basis in them for requesting production of the informer. Thus he deliberately by-passed the issue, precluding its now being raised on a collateral attack. *United States v. West*, — F.2d — (2d Cir. April 11, 1974) (Slip op. at 2889-2890).

* Colon appears to base his present argument on non-disclosure at trial rather than at the probable cause hearing to avoid the well-established rule that grounds of error raised and rejected on direct review cannot be relitigated by way of a Section 2255 motion. *United States v. Dalli*, — F.2d — (2d Cir. January 14, 1974) (Slip op. at 1391-1398); *Williams v. United States*, 334 F. Supp. 669, 671 (S.D.N.Y. 1971), affirmed, 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972).

** The alleged inconsistencies relate to the awakening of Agent Miller in his own home on the morning of Colon's arrest. Miller's testimony at the suppression hearing and the two trials is in fact not significantly inconsistent on the point, and is corroborated by the testimony of Patrolman Graef of the Westwood, New Jersey, police force (Tr. 108-112), and by a contemporaneous entry from the Westwood police blotter (Tr. 109, 111). Graef's testimony was that he went to Miller's home, rang the bell and knocked on the door, and awakened Mrs. Miller to whom he gave a message (Tr. 109). Miller's testimony (Tr. 114) that his wife awakened him and he then had a conversation with a Westwood patrolman after which he called Agent Moser is entirely consistent with Graef's testimony. It is not significantly inconsistent with Miller's testimony at Colon's first trial that he was awakened by his son rather than his wife (Transcript of January 7, 1969, pages 1ox 81 to 1ox 82), nor with his testimony at the suppression hearing that he "was awakened by a pounding on my door by the local patrolman" after which he telephoned Agent Moser (A-55 to A-56), nor with his unrefreshed recollection earlier in that hearing that he had received a phone call from Agent Moser (S. 76-77), especially in light of his statement immediately thereafter that he "called back Agent Moser" (S. 78; A-50).

In any event, it is highly unlikely that Colon would have been entitled to production of the informer at trial even if a request had been made. Since the informer was not present at the time of Colon's arrest there is no basis for assuming that he had any information whatsoever which would have been "relevant and helpful" to establishing the defense of plant. See *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *United States v. Soles*, 482 F.2d 105, 109-110 (2d Cir.), cert. denied, 42 U.S.L.W. 3291 (November 12, 1973). It is nothing but pure speculation to suppose that the informer might have contradicted the agents' testimony on matters unrelated to the alleged plant and thus perhaps impeached their credibility in denying the plant. Such speculation is insufficient to warrant production of an informer at trial. *United States v. D'Amato*, — F.2d — (2d Cir. March 14, 1974) (Slip Op. at 2210-2211).

CONCLUSION

The order of the District Court should be in all respects affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

HOWARD S. SUSSMAN, being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New York.

That on the 9th day of May, 1974
~~he served 2 copies~~ of the within brief
by placing the same in a properly postpaid franked envelope
addressed:

ROTHBLATT, ROTHBLATT, SEIJAS & PESKIN

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New York, New York 10023

And deponent further says that he sealed the said envelope
and placed the same in the mail drop for mailing
the United States Courthouse, Foley Square,
Borough of Manhattan, City of New York.

Howard Sussman
HOWARD S. SUSSMAN

Sworn to before me this

9th day of May, 1974.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978